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IN THE

Supreme Court of the United States

October Term, 1956

No. 528

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

v.

MEYER FEINBERG.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Attorney for Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the prayer of the Solicitor General for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on July 31, 1956.

Opinions Below

The opinion of the District Court is reported in 123 F. Supp. 899. The opinion of the Court of Appeals is not yet officially reported but is set forth in Appendix A, pages 14-22 in Petitioner's petition for the writ.

Jurisdiction

Petitioner invokes the jurisdition of this Court under 28 U. S. C. 1254(1). The judgment of the Court of Appeals was entered on July 31, 1956.

Question Presented

Was the contract herein negotiated by the Association, of which the Respondent was a member on one side, with Local 240, International Brotherhood of Teamsters, Chauffeurs and Helpers, on the other side, for and on behalf of the employees of the Association members, valid and in accordance with this Court's holding in *Walling* v. *Belo Corp.*, 316 U. S. 624 and the 1949 amendment to Section 7 of the Fair Labor Standards Act.

Statute Involved

The provision of the Fair Labor Standards Act involved herein is Section 7(e) as set forth in the petition on page 26.

Statement

The Petitioner commenced this action to enjoin the Respondent from violating the overtime and record-keeping provisions of Sections 7 and 11(c) of the Fair Labor Standards Act. The Petitioner's charge arose out of the Respondent's practices under the provisions of a collective bargaining agreement which Respondent claimed were in conformity with Section 7(e) of such Act and the *Belo* case.

The Respondent is the owner and the operator of a small trucking business located within the City of New York. All of Respondent's customers are located within the confines of the City. His business is to pick up and deliver men's garments in various stages of completion and deliver them either to contractors or to the manufacturers. Respondent's employees are all members of Local 240, referred to above. He is a member of the Greater New York Tailors' Expressmen Association, Inc. The Union and the Association negotiated and signed the contract under which the parties act.

Under this contract, the Respondent guarantees to his employees a weekly wage of 40 hours straight time and 8 hours overtime at time and one half or a total of 52 hours straight time pay. Under this contract the employee is required to perform his daily stint which consists of regular calls over a particular route in the same manner as a milkman will service a route. The completion time of such stint can never be definitely determined. The factors to be contended with, among others, are traffic conditions, the size of the delivery, availability of both access to and use of inner elevators in the buildings wherein customers receive the goods, etc.

Basically, the purpose and the design of the collective bargaining agreement referred to herein was to secure for the employees a guaranteed work week based upon an hourly rate of pay as set forth within the schedules attached to the contract, plus a weekly guarantee of 8 hours per week at time and one half the regular rate of pay. In the event that the employees exceeded the weekly guarantee in the course of his employment, he received time and one half for all such additional time over the 48 hours up to 60 hours.

The District Court held that the Petitioner had sustained the allegations within the complaint and entered an injunction as prayed for. Apparently the District Court felt that the failure of employees of the Respondent, called by the Petitioner, to interpret the contract and could not state what their union representatives did in signing the contract indicated an attempt by the Respondent and the Association to evade the requirements of the Act. The two opinions in the Circuit Court adequately disposed of this viewpoint by holding that (1) the validity of a guaranteed wage plan does not depend upon the fact that employees have or have not worked hours in excess of those guaranteed in the contract or agreement nor (2) does the inadequacy of the records invalidate a proper

guaranteed wage plan when other evidence clearly shows that the employees' duties necessitate irregular hours and that the employees have never exceeded the hours for which the employer has guaranteed to pay. Whether or not certain of the employees fail to completely understand the contract computations by which they are paid does not establish an "unreal" and "fictitious" practice as contended for by the Petitioner.

Petitioner takes the position that because of a provision in the contract (collective bargaining agreement) that any employer may deduct from the weekly guarantee such time or days as the employee fails to report for work for reasons of personal and private nature was in and of itself a departure from Section 7(e) and therefore was violative of the Act. If such non-activity by an employee were to become the law then we can envisage a pretty picture. An employee would report for work on a Monday and then take off the remaining 4 days of the week and expect to receive from the employer a full week's pay. Neither Congress nor this Court intended any such state of affairs.

The intent of the Act was to spread work and to secure employment for as many persons as possible. After the Act was in force for a number of years (1938) and because of the *Rolo* decision, Congress amended the Act in 1949. At that time Congress considered three alternatives to the Act: (1) outlaw guaranteed wage contracts; (2) permit their use subject to specific limitations including the "significant number of workweeks test"; or (3) permit their use without limitation as to the relation between the hours worked and the hours guaranteed. That Congress adopted the last of the alternatives in preference to the first two which were advocated by the Petitioner indicates that Congress favored the *Rolo* type contracts and that it did not intend to limit their use in the manner suggested by the Petitioner or his foreign counterparts.

The activities regulated herein by the collective bargaining agreement controls a purely local and small business, and the type of collective bargaining agreement employed in this industry is not employed widely elsewhere. The decision of the Court below is of narrow applicability or importance, and does not warrant review by the Supreme Court.

The argument by the Petitioner that the decision by the Second Circuit Court of Appeals herein was in violation of the holding in the *Asselta* case is not very persuasive. The *Asselta* case was decided by the same Court in 1946, some three years before Congress codified the decision of this Court in the *Belo* case by the 1949 amendments to the Fair Labor Standards Act. To the extent that the decision in this case is in accordance with the 1949 amendments to the Act, such fact may be termed a "variation" of the *Asselta* decision. Also, the facts in the *Asselta* case are distinguishable from the facts in the instant case.

In the *Asselta* case the parties in regulating their activities sought to use the National War Labor Board Agreement formula plus a standard of their own creation under which arrangement the employee despite the hours worked could never receive compensation above the stipulated figure with that contract. The argument in that case was that the parties understood that the stated weekly wage included what statutory overtime was inherent in the stated work week.

In contrast to the attempted formula in the *Asselta* case, the contract in the instant case detailed (1) the hourly rate; (2) the hours of the workweek; (3) the specific guarantee of 8 hours of overtime per week at time and one half the hourly rate; (4) that if the employee worked in excess of 48 hours per week then all hours so worked in excess of 48 up to 60 hours inclusive were to be paid for at time and one half the regular rate as set forth in the schedule attached to the contract.

CONCLUSION

The decision of the Court below is correct. There are no conflicts of decisions and the case does not call for review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BENJAMIN COOPER,
Attorney for Respondent.